

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS TRIBUNAL DECISION

Thursday 15 April 2010
TRIBUNAL SITTING No. 51/ CASE 2
CASE REFERENCE: 822799/PJ

Service provider:	MBlox Limited, London
Information provider:	QLD Limited, London
Type of service:	Mobile content subscription competition
Title:	'Unlimitedwap.co.uk'
Service numbers:	81666, 89900 and all other shortcodes on which the service is available
Cost:	£4.50 per week
Network operator:	All Mobile Network Operators
Number of complainants:	4

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

PhonepayPlus received four complaints in relation to the service operating on shortcodes 81666, 89900 and all other shortcodes on which the service was available. The service was a mobile content subscription service and was operated by QLD Limited.

Consumers stated to have first heard of the service on receiving an unsolicited text message charged at £1.50. An example of the text message is as follows:

"great news, we've expanded ur library with ring tones, games and images. You can now view 190 items"

During the course of its monitoring, the Executive also identified problems with regard to the fairness of the service, pricing information, contact information and information on how to leave the service.

The Service

The Executive visited the unlimitedwap.co.uk website through which the service appeared to be promoted.

It appeared through monitoring that there were two variations of the 'unlimitedwap.co.uk' website. One screenshot of this website is at Appendix A.

When monitoring the website, the Executive was presented with a screen that prompted the user to enter their mobile phone number on to the website (Appendix B). Upon entering a mobile phone number the following text message was received:

FreeMsg: Reply GO to get unlimitedwap's top 50 FREE downloads. It's a Free 7 day trial so have it all. To end subscription txt stop. Txt GO to 89900 now

The Executive noted that the text message referred to the keyword 'Go' however the 'unlimitedwap.co.uk' website contained the keyword 'yes' (the latter was found exclusively on the 'unlimitedwap.co.uk' website (Appendix C)). The Executive noted that at the time of its monitoring it was only possible to enter the service by texting the keyword 'YES'. It noted that the keyword 'GO' (although in the text message sent to consumers) did not enter the monitoring handset into the service.

The Investigation

The Executive conducted this matter as a Standard Procedure investigation in accordance with paragraph 8.7 of the Code.

The Executive issued a breach letter to the Information Provider dated 21 January 2010. The Executive received no response to its breach letter.

The Tribunal made a decision on the breaches raised by the Executive on 15 April 2010.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE LEGALITY (Paragraph 5.2)

"Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful."

1. The Executive submitted that under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('the Regulations'), it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions, or (2) the recipient's details were obtained whilst purchasing a similar or related product and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication (this is known as "soft opt-in").

The Executive submitted that all four complainants stated that the text messages they had received had been unsolicited and that they had only become aware of the service following receipt of text messages from shortcode 81666 and/or finding premium rate charges on their telephone bills.

The Executive made reference to the following complaint:

"I recently checked my mobile phone bill on-line, and was shocked to find that I had been receiving text messages from a company (81666) and being charged at a premium rate. Obviously, I was aware that I was receiving these texts but was totally unaware that I was being charged for them, as I have at no point subscribed to any of the services and don't know how they got my number"

The Executive submitted that it was of the view that as users were able to enter a mobile phone number into the unlimitedwap.co.uk website, it was possible to enter a different mobile phone number into the website. It submitted that in such a scenario it was of the opinion that the text message issued would be unsolicited.

The Executive submitted that further monitoring had identified an area of the unlimitedwap.co.uk website that invited visitors to send free text messages to friends' mobile handsets. It submitted that it had monitored this aspect of the service. It submitted that it sent a test text message and the monitoring phone subsequently received the following:

“FreeMsg: Reply GO to get unlimitedwap’s top 50 FREE downloads. It’s a Free 7 day trial so have it all. To end subscription txt stop. Txt GO to 89900 now”

2. The Information Provider did not respond to the potential breach raised by the Executive.
3. The Tribunal considered the evidence and concluded that, on the basis of the Executive’s monitoring, on entering a mobile number into the unlimitedwap.co.uk website an unsolicited promotional text message was sent immediately to the number entered. There was no evidence that the recipient of that message had visited the website or consented to receive promotional messages. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

**ALLEGED BREACH TWO
FAIRNESS (MISLEADING) (Paragraph 5.4.1a)**

“Services and promotional material must not mislead, or be likely to mislead in any way.”

1. The Executive made reference to its monitoring of the service and submitted that it had identified that the text message below was issued to users when their mobile telephone number was entered into the unlimitedwap.co.uk website. The Executive submitted that the text message read as follows:

“FreeMsg: Reply GO to get unlimitedwap’s top 50 FREE downloads. It’s a Free 7 day trial so have it all. To end subscription txt stop. Txt GO to 89900 now”.

The Executive submitted that it was of the opinion that recipients of the unsolicited text message (ie: those who had not visited the website or viewed the full service terms and conditions) might be more inclined to engage and interact with the service as the text message offered a free seven day trial. It submitted that in addition, as no pricing information was stated in the text message, recipients may have reasonably assumed that at the end of the seven day trial their access to the service would be suspended as opposed to becoming chargeable.

The Executive submitted that further monitoring had identified an area of the unlimitedwap.co.uk website that invited visitors to the website to send free text messages to their friends' mobile handsets. The Executive submitted that it had monitored this aspect of the service and sent a test message to the monitoring phone that subsequently received the following:

“FreeMsg: Reply GO to get unlimitedwap’s top 50 FREE downloads. It’s a Free 7 day trial so have it all. To end subscription txt stop. Txt GO to 89900 now”

It submitted that a user’s friend was unlikely to have previously visited the unlimitedwap.co.uk website or viewed the full terms and conditions, and as such was

more likely to have been misled into interacting with the service on receipt of the marketing text message.

2. The Information Provider did not respond to the potential breach raised by the Executive
3. The Tribunal considered the evidence and concluded that it was not satisfied that anyone could opt-in to the service by receipt of the unsolicited text message alone and was satisfied that consumers would have had to also register on the website in order to have entered into the service. The website had contained full terms and conditions in relation to the service and, on the balance of probabilities, users had not been misled. The Tribunal did not uphold a breach of paragraph 5.4.1a of the Code.

Decision: NOT UPHELD

ALLEGED BREACH THREE PRICING INFORMATION (COST) (Paragraph 5.7.1)

“Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge”

1. The Executive submitted that during the course of its monitoring it entered a monitoring mobile phone number into the unlimitedwap.co.uk website. It subsequently received a promotional text message that read as follows:

“FreeMsg: Reply GO to get unlimitedwap’s top 50 FREE downloads. It’s a Free 7 day trial so have it all. To end subscription txt stop. Txt GO to 89900 now”

It submitted that the absence of pricing information in the above promotional message was a breach of paragraph 5.7.1 of the Code.

2. The Information Provider did not respond to the potential breach raised by the Executive
3. The Tribunal considered the evidence and noted that the message logs indicated that users had texted the keyword ‘YES’ as directed on the unlimitedwap.co.uk website. The Tribunal also noted that the keyword ‘YES’ was only found on the website and that it could be inferred that users had seen the website and the terms and conditions therein including the pricing information. The Tribunal also found that when the keyword was sent to the relevant shortcode, users received a free subscription initiation text message containing some pricing information (in addition to that already present on the website). The Tribunal did not uphold a breach of paragraph 5.7.1 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH FOUR CONTACT INFORMATION (Paragraph 5.8)

“For any promotion, the identity and contact details in the UK of either the service or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user.”

1. The Executive submitted that during the course of its monitoring it entered a monitoring mobile phone number into the unlimitedwap.co.uk website. It subsequently received a promotional text message that read as follows:

“FreeMsg: Reply GO to get unlimitedwap’s top 50 FREE downloads. It’s a Free 7 day trial so have it all. To end subscription txt stop. Txt GO to 89900 now”

It submitted that the absence of contact information in the above promotional message was a breach of paragraph 5.8 of the Code.

2. The Information Provider did not respond to the potential breach raised by the Executive
3. The Tribunal considered the evidence and concluded that on the basis of the unsolicited promotion via the website the only promotional text message the user would have received would not have contained the identity or contact details of the Information Provider or the Service Provider and users were as such unaware as to the identity of the company operating the service. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE SUBSCRIPTION INITIATION MESSAGE (HOW TO LEAVE THE SERVICE) (Paragraph 7.12.4e)

“Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:

e) how to leave the service”

1. The Executive submitted the message logs provided by the Information Provider indicated that after the complainants had sent the keyword to the shortcode, a subscription initiation text message was issued that read as follows:

“Free Msg:7 day TRIAL 4 unlimited download subscription. After trial £4.50pw, password is BIRD Goto Unlimitedwap.co.uk, enter password. Help 08712880843”

The Executive submitted that it was of the view that as reference to the ‘STOP’ command was not made in the subscription initiation text message, a breach of Paragraph 7.12.4e of the Code had occurred.

2. The Information Provider did not respond to the potential breach raised by the Executive
3. The Tribunal considered the evidence and concluded that the subscription initiation text message received by users had not provided details on how to leave the service and that this was supported by the complainant message logs. The Tribunal found that the availability of the ‘STOP’ command had not been advertised and it followed that there had been a breach of the Code. The Tribunal upheld a breach of paragraph 7.12.4e of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **moderate**.

The Tribunal noted that the Information Provider (QLD Limited) had ceased trading on 31 August 2009 and matters were concluded on 31 October 2009, although a letter received on 13 November 2009 from the Information Provider made no mention of these facts. In addition, the Tribunal noted that the letter was in almost identical terms and wording as a letter received from the company known as 'Digital Daze' in a previous adjudication dated 10 December 2009 (case ref: 807937/AB) that also liquidated.

There were no aggravating factors in this case for the Tribunal to consider.

In mitigation, the Tribunal noted the following factors:

- The Information Provider asserted that it had made refunds to complainants.

The revenue in relation to this service was in the low range of Band 4 (£50,000-£100,000).

Having taken the mitigating factor into account, the Tribunal concluded that the seriousness of the case should be regarded overall as **moderate**.

Having regard to all the circumstances of the case, including the revenue of the service, the Tribunal decided to impose the following sanctions:

- A Formal Reprimand;
- Fine of £15,000;

The Tribunal commented that it expected claims for refunds to continue to be paid by the Information Provider for the full amount spent by complainants, except where there is good cause to believe that such claims are not valid.